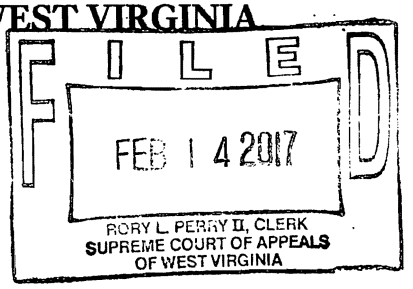
# IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA




No. 16-0844

**IPACESETTERS, LLC,**
**Petitioner**

**v.**

**KACE DOUGLAS and RANDI DAMPHA, et al.**
**Plaintiffs Below, Respondents**

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Honorable Jason Cuomo, Judge
Circuit Court of Brooke County
Civil Action No. 10-C-33

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## REPLY BRIEF OF THE PETITIONER

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## I. INTRODUCTION

From the erroneous language in the writ of suggestion served on Petitioner, iPacesetters, LLC, through their Brief filed with this Court, the Respondents, former employees of Tele-Response, Inc. ["Tele-Response" or "judgment debtor"], have ignored the clear and unequivocal language of the suggestion statute limiting a third-party's obligation to answer a suggestion by identifying and surrendering property held by or payments owed to the judgment debtor "**at the time of service of the summons**," W. Va. Code § 38-5-13 [Emphasis supplied], instead treating the suggestion statute as if it creates some independent cause of action against a third-party by which a judgment creditor can hold the third-party liable as a judgment debtor on a going forward basis.

Not only did this violate fundamental principles of due process, it resulted the Circuit Court ignoring a federal tax and a judgment lien having greater priority; erroneously holding that Petitioner's future obligations to make payments to the judgment debtor or on the judgment debtor's behalf were subject to suggestion; and wrongfully denying Petitioner's right to a jury trial to the extent that it resolved disputed issues of fact.

## II. STATEMENT OF THE CASE

The fallacies in Respondents' arguments in opposition to Petitioner's appeal are as simple as they are fundamental. Respondents continue to labor under the erroneous premise – which they convinced the Circuit Court to adopt – that a suggestion is an independent cause of action rather than legal process served on a third-party to surrender any of a judgment debtor's property in the possession of the third-party or any amounts due and owing by the third-party to the judgment debtor **at the time of service of the suggestion upon the third-party**.

West Virginia's statute, like those of other states, establishes a "snapshot rule" which "operates only on property that the garnishee possessed at the time the garnishment order was served" and "not on property acquired thereafter."[1]

Respondents do not dispute that the suggestion they served on Petitioner was pursuant to W. Va. Code §§ 38-5-10, et seq.,[2] but they ignore its clear and unambiguous provisions as follows:

> Upon a suggestion by the judgment creditor **that a person is indebted or liable to the judgment debtor or has in the person's possession or control personal property belonging to the judgment debtor**, which debt or liability could be enforced, when due, or which property could be recovered, when it became returnable, by the judgment debtor in a court of law, and which debt or liability or property **is subject to the judgment creditor's writ of *fieri facias*, a summons against such person may be issued out of the office of the clerk of the circuit court** or of the magistrate court of the county **in which the judgment creditor obtained the writ of *fieri facias***, requiring such person **to answer the suggestion in writing and under oath** . . . .[3]

In other words, this statute permits a judgment creditor, like Respondents, to have a summons issued in the county in the judgment creditor obtained a writ of *fieri facias* to someone, like Petitioner, whom or which the judgment creditor claims "**is** indebted or liable to the judgment debtor" or "**has** in the person's possession or control personal property belonging to the judgment debtor" at the time of service of the suggestion.

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[1] *Travelers Casualty & Surety Co. v. Whitehouse-Franklin, LLC*, 2007 WL 247894 (W.D. Ky. 2007)("The statute thus establishes a '"snapshot rule,"' operating only on property that the garnishee possessed at the time the garnishment order was served,' not on property acquired thereafter.")(citations omitted); see also *McMahan & Company*, 206 F.3d 627 at *5 n.5 (6th Cir. 2000)("Also, under Kentucky's 'snapshot' rule, the account balance is to be determined as of the time the garnishment is served."); *FG Hemisphere Associates, LLC v. Republique du Congo*, 455 F.3d 575 (5th Cir. 2006); *Dollen v. Dollen*, 2014 WL 6067658 (Mich. Ct. App.).

[2] [Respondents' Brief at 1]("This appeal arises from a proceeding in aid of execution against Petitioner pursuant to W. Va. Code §38-5-10 et seq.")

[3] W. Va. Code § 38-5-10. [Emphasis supplied]

W. Va. Code § 38-5-13, governing the answer to a writ of suggestion, clearly and specifically states, "The answer of the person suggested shall state, in addition to the matters required to be disclosed by the summons mentioned in section ten of this article, the nature and amount of liability or indebtedness to the judgment debtor **at the time of service of the summons**, or a description of the property of the judgment debtor **held by the person suggested at the time of service of the summons**." [Emphasis supplied]

There is absolutely no ambiguity in the statute – any third-party, like Petitioner in this case – is only obligated to tender to the judgment creditor(s), like the Respondents, any property of the judgment of the judgment debtor, like Tele-Response, in the possession of the third-party "**at the time of service of the summons**," of which there was none in this case, and any monies for which the third-party is indebted or liable to the judgment debtor "at the time of service of the summons," which in this case was on October 11, 2012.[4]

In Syllabus Point 3 of *Waco Equipment Company v. B.C. Hale Construction Company, Inc.*, 182 W. Va. 381, 387 S.E.2d 381 (1989), for example, this Court reiterated, "'A contingent liability, *ex contractu*, is not subject to an order of attachment and garnishment.' Syl. pt. 4, *M.W. Kellogg Co. v. Concrete Accessories Corp.*, 157 W. Va. 763, 204 S.E.2d 61 (1974)."

Because the contractual obligations involved, like the contractual obligations at issue in this case, were not due and owing when a "snapshot" was taken at the time of service of the writ of suggestion on the third-party, this Court held as follows:

> In conjunction with this holding the trial judge also held that Waco, the judgment creditor, had no right to a suggestion lien on the retainage in the subcontract. The trial judge reasoned that under W. Va. Code, 38-5-10, Waco is entitled to a lien on the retainage only if Turner owed the retainage to Hale. Since Hale failed to

[4] [Respondents' Brief at 6]

> perform the terms of the subcontract concerning full payment of the materialmen, the materialmen, rather than Hale, were owed the $39,000 retainage; therefore, there was no debt owing to Hale that was subject to a suggestion lien. . . .
>
> In a strikingly similar case to the one before the Court today, *M.W. Kellogg Co. v. Concrete Accessories Corp.*, 157 W. Va. 763, 204 S.E.2d 61 (1974), we addressed when contractual proceeds may be considered a liability, subject to garnishment. . .
>
> The trial judge denied the subcontractor's and materialman's motions to dismiss the complaint in the civil action, but granted their motions to quash the attachment proceeding. We affirmed.
>
> In doing so, this Court noted that, at the time, Kellogg, the general contractor, filed the civil action, the power station owner had not yet exercised its rights under the retainage clause, therefore, "Kellogg was suing [the materialman] and [the subcontractor] for a liability which *would mat*ure at a future time." (emphasis added). *Kellogg*, 157 W. Va. at 767, 204 S.E.2d at 64. . . .
>
> In the case before the Court today, under the terms of the subcontract, Turner, the general contractor, had limited its liability and was not required to pay Hale, the subcontractor, the 10% retainage until, among other things, Hale provided proof to the general contractor that there were no outstanding liens against the project created by Hale's failure to fully pay laborers and materialmen. Turner's liability to Hale was contingent upon Hale's performance of the terms in the subcontract. Clearly, Hale never complied with the terms of the subcontract when it left the job with outstanding debts and liens associated with the subcontract. Therefore, the trial judge properly concluded that there was no debt owed Hale, the subcontractor, against which Waco, the judgment creditor, could attach a suggestion lien.[5]

The foregoing reduces to rubble Respondents' arguments because they concede that "at the time of service of the summons "**Petitioner did not know the specific amount of the monthly obligation**" under its contracts with Tele-Response.[6]

This Court will see no argument or reference to record evidence that "**at the time of service of the summons**" Petitioner owed Tele-Response any present obligation to pay anything

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[5] *Waco*, supra at 386-387, 387 S.E.2d at 853.

[6] [Respondents' Brief at 4] [Emphasis supplied]

over to Tele-Response, whether in the form of property or a debt obligation, because there was no such present obligation. Rather, the contractual agreements merely obligated Petitioner to make payments on Tele-Response's behalf if certain contingencies were met.

Where this case when awry in the Circuit Court was that after it properly rejected Respondents' efforts to impose successor liability on Petitioner because it is not a successor to Tele-Response, it effectively made Petitioner the judgment debtor in place of Tele-Response. The following excerpts from Respondents' Brief illustrate this point:

- The court then found that Petitioner's obligation to make the payments to Tele-Response was fixed, and the fact that Petitioner **did not know the specific amount of the monthly obligation in advance** did not make the contractual obligation contingent.

- **While the specific amounts were not known,** the obligation to make these payments [in the future] was certain.

- [T]he Petitioner's decision, **before receipt of the Suggestion,** to pay $250,000 owed to Tele-Response in a series of payments eliminates any claim of "contingency" on this specific debt.

- While **the specific amounts of the monthly payments were not known,** the obligation to make these payments was certain.

- **Although the specific amounts of the monthly payments may have been unknown,** Petitioner was obligated to pay whatever that amount was and had been making those payments for at least nine months before Petitioner received the Respondents' Suggestion.

- This document shows monthly payments from Petitioner to Tele-Response in varying amounts . . . after the Suggestion was received, **from November 2012 through July 2013** . . .

- [W]hile Petitioner **may not have known the exact amounts it would have to pay Tele-Response each month** . . . .

- Thus, the Petitioner's contractual obligation to pay the invoices submitted by Tele-Response on a monthly basis was certain, **although the specific amounts of the invoices was unknown.**

- Petitioner's claim that every payment made to Tele-Response was a "contingent obligation" **because an invoice was not in Petitioner's hands at the time the suggestion was received** . . .

- On November 2, 2012, just five days *after* Petitioner filed its Answer to the Suggestion, it made a payment of $51,000, followed by a payment on November 13, 2012 . . .

- Clearly, Petitioner knew that it had a continuing obligation to make payments . . . **even if the specific amounts were not known** . . .

- Petitioner's lack of knowledge regarding the *amount* of the payments owed to Tele-Response **until the invoices were "received" or fell "due" does not make those debts "contingent" from a legal standpoint**.[7]

Plainly, if Petitioner "did not know the specific amount" it owed to the judgment debtor; if "the specific amounts were not known;" and if payments were made "before receipt of the Suggestion, and, thus, were not due and payable "at the time of service of the summons," they were simply outside the suggestion statute which, again, is a "snapshot" statute.

Accordingly, Respondents' argument that, "Since there was certainty as to Petitioner's liability for this debt, it was not contingent"[8] is simply wrong where there is no record evidence that "at the time of service of the summons" Petitioner owed anything to Tele-Response.[9]

Even the suggestion served on Petitioner by Respondents reflected their fundamental misunderstanding and misstatement of the suggestion statute:

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[7] [Respondents' Brief at 4, 5 6, 7, 23, 25-26] [Emphasis in original and **as supplied**]

[8] [Respondents' Brief at 7]

[9] Indeed, as Respondents acknowledge in their brief, "Petitioner's Chief Financial Officer Michael Kennedy . . . testified that . . . even though Petitioner sent money to Tele-Response on a monthly basis, **if there was no invoice on his desk at the moment . . . the Petitioner did not owe any sums to Tele-Response at that time**." [Respondents' Brief at 9] [Emphasis supplied]

| Suggestion Statute | Respondents' Suggestion |
|---|---|
| "Upon a suggestion by the judgment creditor **that a person is indebted or liable to the judgment debtor or has in the person's possession or control personal property belonging to the judgment debtor** . . . ."[10] | "Amounts and/or monies and/or debts and/or obligations and/or things of value owed **and/or to be owed** and/or due **and/or to be due to Tele-Response** . . . ."[11] |

Judgment creditors are not at liberty to re-write the suggestion statute, but that is precisely what the Circuit Court permitted in this case – extending its application beyond obligations for which a third-party "is indebted or liable" to debts "to be owed" and liabilities "to be due" to the judgment debtor not "at the time of service of the summons" into the future. Plainly, this was contrary to the statute and contrary to fundamental principles of due process.

## III. SUMMARY OF ARGUMENT

Pursuant to the written agreements between Petitioner and the judgment debtor, Petitioner was obligated to make certain payments only upon the occurrence of certain contingencies, **none of which were present at the time of service of the suggestion**, and the Circuit Court clearly erred, as a matter of law, in applying the suggestion statute to impose liability on Petitioner for contractual obligations arising after service of the suggestion, and involving the payment of superior tax and judgment liens. Accordingly, Petitioner is entitled to judgment as a matter of law on appeal or, alternatively, to the extent that the Circuit Court resolved disputed issues of material fact, Petitioner is entitled to a remand for a jury trial.

[10] W. Va. Code § 38-5-10 [Emphasis supplied].

[11] [Respondents' Brief at 6] [Emphasis supplied]

## IV. ARGUMENT

### A. THE CIRCUIT COURT ERRED BY IGNORING A FEDERAL TAX LIEN AND A JUDGMENT LIEN HAVING GREATER PRIORITY THAN THE SUGGESTION BY RESPONDENTS, AS JUDGMENT CREDITORS, AGAINST PETITIONER.

#### 1. Respondents Are Unable to Substantively Dispute Petitioner's Legal Arguments Relative to the Superiority of the Federal Tax Lien and Their Procedural Arguments Not Only Have No Merit, But Were Not Raised in the Lower Court.

Again, there is no dispute in the record that the payments on the tax and judgment liens took place **after** Petitioner was served with the writ of suggestion on October 11, 2012:

> Garnishee iPacesetters maintains that . . . various payments it made **after October of 2012** were to entities with "preexisting and perfected liens against Tele-Response." . . .
>
> As for the suggestion that the plaintiffs are attempting to "leapfrog" over other "higher prioritized" leans [sic], this Court agrees with the plaintiffs that this is not a real estate transaction where liens are prioritized based upon whether they are properly recorded and, even if this were the situation, iPacesetters was not a party to those other liens. As plaintiffs put it, "iPacesetters cannot provide preferential treatment to Tele-Response's other creditors by ignoring its legal obligation to honor the **Suggestion of Personal Property** the plaintiffs properly served upon it to collect on their judgment."[12]

Of course, this discussion by the Circuit Court in its order entirely misses the point as Petitioner was obligated only to surrender Tele-Response property in Petitioner's possession or debt payments by Petitioner to Tele-Response that were due and owing "**at the time of service of the summons.**" What payments Petitioner may have made to or on behalf of Tele-Response after service of the suggestion as certain contingencies arose are entirely irrelevant under the statute.

Similarly, Respondents argue in their brief that "the court concluded that . . . because there was no evidence that any of Tele-Response's other creditors had attempted garnishment

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[12] [App. 2875, 2883-2884] [Emphasis supplied]

proceedings against Petitioner, and Petitioner was not a 'party' to any such other lien," but not only was Petitioner not a party to the liens against Tele-Response by the IRS and a previous judgment creditor, it was not a party to Respondents' lien against Tele-Response, and service of the suggestion, under West Virginia, did not make it so.

Notably, Respondents do not dispute that the general rule under federal law with respect to the priority of federal tax liens, as interpreted by the Supreme Court, is "first in time is the first in right."[13] Rather, Respondents make the procedural argument that because the federal tax lien was not attached to an affidavit setting forth the payments made to the IRS, the existence of the obligations of Tele-Res should be ignored [Respondents' Brief at 14-17], but Respondents concede that (1) "Exhibit C to the DeBiasi affidavit has a list titled 'IRS Payments;'" [Respondents' Brief at 10], which constitutes documentation of the IRS tax payments;[14] (2) "these payments were made" after entry of "the lower court's October 21, 2013 Order" [Respondents' Brief at 11], which is a full year after service of the summons; and (3) "neither the IRS lien nor the Dresnok lien had been completely paid as of July 2014" [Respondents' Brief at 11], which almost two years after service of the summons.[15]

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[13] *United States v. City of New Britain*, 347 U.S. 81, 74, 85-86 (1954).

[14] Indeed, Respondents' own brief references the specific dates and amounts of those federal tax payments [Respondents' Brief at 13] and the contract documents between Tele-Response and Petitioner reference federal tax obligations, state tax obligations, and local tax obligations. [App. 508-509]

[15] Respondents also complain in their brief that, "The Petitioner never sought guidance from the Court on how it should properly dispose of sums it owned to Tele-Response **after being served with the Respondents' Suggestion**" [Respondents' Brief at 11][Emphasis supplied]; "**the United States has made no effort in the case to protect its interests . . . or to prevent Petitioner from tendering those payments**" [Id. at 12][Emphasis supplied]; and "**Nor did Petitioner attempt to join the United States as a party**" [Id.][Emphasis supplied], which would have been precluded by federal law as the federal government cannot be made a party to state court litigation, completely miss the point because debt obligations that arose **after** service of the summons, including those precipitating subsequent payments towards the federal tax obligations of Tele-Response, were beyond its statutory reach.

In support of their argument, Respondents' reference R. Civ. P. 56(e), but that rule states that, "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith," and the only papers referenced in the subject affidavit were attached to it and, indeed, Respondents discuss those papers in their brief. Thus, the affidavit fully complied with Rule 56(e). [16]

Moreover, the law is clear that, "It is the obligation of an opposing party to object at the trial level to any document violation under Rule 56(e)... The objection must be made timely or it may be deemed to have been waived"[17] and Respondents' brief references no objection to the subject affidavit or the documents attached to it because there was none.[18]

Rather, because record evidence is clear that payments made by Petitioner after receipt of Respondents' suggestion were to satisfy a pre-existing tax obligation and Respondents have no legal argument as to the priority of such obligation, Respondents resort to a procedural argument they waived due to their failure to object.

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[16] The Respondents discuss this Court's decision in *Jackson v. Putnam County Bd. of Educ.*, 221 W. Va. 170, 653 S.E.2d 632 (2007), but (1) in that case, the missing document, a policy manual, was necessary in order for this Court to decide the arguments presented and (2) in this case, there is substantial documentary evidence in the record, some of which Respondents utilize in advancing their arguments, demonstrating that Tele-Response had a federal tax obligation and Petitioner made payments towards that federal tax obligation.

[17] F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH at § 56(e)[2] (2014)[Footnotes omitted]

[18] At a hearing conducted on August 19, 2013, Petitioner's counsel noted, "The evidence shows that there's federal tax liens and other tax liens that would be ahead of whatever creditor they are in this case." [App. 2191] So, Respondents' insinuations that the issue was not timely raised and there was insufficient record evidence on the issue are simply incorrect. Not until their Brief did Respondents argue about an absence of evidence of the federal tax obligations referenced in the contract documents between Petitioner and Tele-Response.

2. **Respondents' Arguments Regarding the Pre-Existing Judgment Lien Are Without Merit as Whether that Judgment Creditor Served a Suggestion or Otherwise Sought Enforcement of that Judgment Against Petitioner is Irrelevant Where There Was No Present Obligation on the Part of Petitioner to Pay Anything to the Judgment Debtor in this Case at the Time of Service of the Writ of Suggestion and Any Subsequent Payments Were Made as a Result of Contingencies Triggering Petitioner's Contractual Obligation to Make Such Payments to the Earlier Judgment Creditor.**

Likewise, the Circuit Court erred in giving Respondents' judgment lien priority over the previous judgment lien in favor of Joseph Dresnock. As in the rest of their brief, Respondents' discussion of this issue misses the point: "There is no evidence Dresnok attempted to enforce his judgment lien by garnishing or levying against amounts owed by the Petitioner to Tele-Response."[19]

First, as Respondents acknowledge in their brief, the applicable Pennsylvania statute provides, "Any judgment . . . shall be a lien upon real property . . . when it is entered of record."[20] Accordingly, a lien arose when the judgment was entered against Tele-Response, not when Dresnok served a writ of suggestion, garnishment, or other collection mechanism on Petitioner.

Second, there was no reason for Dresnok to garnish or levy amounts owed by Petitioner when, as Respondents concede, Petitioner was periodically making payments on the judgment once certain contingencies were satisfied obligating Petitioner to make such payments.

Third, just as Respondents did not have the right to enforce against Petitioner their judgment against Tele-Response, neither did Dresnok, **unless at the time of service of a writ of suggestion, garnishment, or other collection mechanism Petitioner had property belonging to Tele-Response or had an immediate obligation to make payment to Tele-Response.**

[19] [Respondents' Brief at 18]

[20] [Id.]

Finally, the record evidence is undisputed in the contract documents between Tele-Response and Petitioner that what is designated "Contingent Liabilities" was the Dresnok judgment.[21]

In this case, the Circuit Court, without citing any authority other that Respondents' arguments that a superior judgment lien should be ignored, allowing as the Circuit Court characterized it, the Respondents to "leap frog" over the prior and superior judgment lien. Setting aside the fact that it was erroneous under the statute to explore any payments made by Petitioner on obligations arising after "service of the summons," the Circuit Court was wrong to ignore the preexisting judgment lien and its rulings on this issue should be reversed.

**B. THE CIRCUIT COURT ERRED BY HOLDING THAT PETITIONER'S CONTINGENT OBLIGATIONS TO MAKE PAYMENTS TO THE JUDGMENT DEBTOR WERE SUBJECT TO SUGGESTION.**

"Since an attachment is purely a statutory remedy, the jurisdiction thereof is a special and limited jurisdiction, and a court, even of general jurisdiction, cannot proceed by attachment unless the power rests upon express statutory authority."[22] Similarly, "Garnishment is purely a creature of statute, and the procedure pointed out by the statute must be followed; it is not within the rules of construction governing common-law actions. It cannot be resorted to except where the statute expressly authorizes it."[23]

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[21] [App. 508]

[22] 2A M.J., *Attachment and Garnishment*, § 22 (2011).

[23] *Id.* at § 88; see also *id.* ("Garnishment is the exercise of a special and limited statutory power, the requisites of which are jurisdictional.")[Footnotes omitted] One of the pertinent jurisdictional limits is that a non-resident, like Petitioner, is not subject to suggestion unless the non-resident holds property of the judgment debtor in West Virginia or the debt obligation of the non-resident to the judgment debtor is payable in West Virginia. See *id.* at § 91 ("A nonresident, although found within the state temporarily and served with process, cannot be subjected to garnishment unless he has effects of the debtor within the state or has contracted to deliver to him property within the state.")[Footnotes omitted]

Importantly, garnishment statutes are to be strictly construed because they are "in derogation of the common law" and are "harsh in effect upon debtors."[24] Accordingly, the statutes at issue in this case must be strictly construed against Respondents.

For example, as noted, "Garnishment is an ancillary statutory proceeding which has long been resorted to in aid of the collection of judgments. Its purpose is to divert to the judgment creditor **a payment due** the judgment debtor by a third person."[25] "Garnishment is in the nature of a proceeding in rem. . . . Garnishment is, in effect, a suit by the defendant, in the name of the plaintiff, against the garnishee, and he generally occupies towards the garnishee the same position that his debtor occupied; **his rights are no higher**."[26] Accordingly, the liability of a garnishee is limited to the property of the judgment debtor in the possession or control of the garnishee and to the indebtedness of the garnishee to the judgment debtor **at the time of service of the writ of suggestion**.[27] For this reason, this Court has repeatedly recognized that "[in] general, a debt or claim which is uncertain or contingent, in the sense that it may never become due and payable, is not garnishable."[28] A contingent interest has been defined as "one in which liability is not certain and absolute, but depends upon some independent event."[29]

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[24] *M.W. Kellogg Co. v. Concrete Accessories Corp.*, 157 W. Va. 763, 204 S.E.2d 61 (1974)[Emphasis supplied].

[25] *Commercial Bank of Bluefield v. St. Paul Fire & Marine Ins. Co.*, 175 W. Va. 588, 336 S.E.2d 552 (1985) [Emphasis supplied]

[26] 2A M.J., *Attachment and Garnishment*, § 87 (2011)

[27] *Bowling v. Bluefield-Graham Fair Ass'n*, 84 W. Va. 41 (W. Va. 1919) (recognizing the general rule that the rights of the plaintiff and the garnishee are fixed as of the date of service of the writ of suggestion).

[28] *Id.* at 557; see also *M.W. Kellogg Co.*, 157 W. Va. at 770, 204 S.E.2d at 66 ("A contingent debt, though arising out of contract, cannot be garnished, as it would be unjust to the garnishee to render a judgment against him on a contract when the amount apparently due, according to the terms of the contract, may be extinguished by subsequent events . . . ." Moreover, "[i]n order to attach a debt due in the future it must be a certain debt which will become payable upon the lapse of time and not a

For example, "a fire insurance company cannot be made a garnishee while it has the option to rebuild the burned property or pay its value, for such liability is contingent and never will exist if it elects to rebuild."[30] Similarly, "a sailor's wages which are contingent upon the voyage being successful cannot be subjected to attachment or garnishment until the voyage is complete."[31] Likewise, payments contingent upon the execution of a release; payments contingent upon the terms of a negotiable instrument; and payments due a partner while the firm's accounts and liabilities remain unsettled and unpaid all have been held not to be subject to attachment and garnishment.[32]

Here, the payments made by Petitioner to Tele-Response were clearly contingent in nature, similar to the foregoing examples, because no obligation to pay existed without the performance of certain conditions precedent.

For example, Petitioner's obligation to remit amounts to Tele-Response to cover the costs of the vendor services was contingent upon both the actual provision of services by the respective vendors **and** submission by Tele-Response of an invoice and proper supporting documentation.[33] If no services were provided, Petitioner bore no liability. Furthermore, if Tele-

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contingent liability, which may become a debt or not on the performance of some other acts or the happening of some uncertain event."); accord, *Minotti v. Brune*, 94 W. Va. 181 (W. Va. 1923); Syl. pt. 3, *Waco Equip*, supra ("A contingent liability, *ex contractu*, is not subject to an order of attachment and garnishment.").

[29] *Id.*

[30] 2A, M.J., *Attachment and Garnishment*, § 95 [Footnote omitted]

[31] *Id.* [Footnote omitted]

[32] *Id.* [Footnotes omitted]

[33] [App. 2445]

Response failed to produce appropriate supporting documentation regarding the amounts due the vendors, Petitioner bore no liability.[34]

There is no clearer example of a liability that is contingent as Petitioner's responsibility to Respondent did not arise under the applicable contract until the occurrence of conditions precedent, i.e. the actual provision of services by the vendors and the submission of supporting documentation.[35]

"A judgment attaches only to the extent," it has been noted, "that the judgment debtor has an interest in the property sought to be attached, and thus property in which the judgment debtor has **no present interest** may not be subjected to garnishment."[36] Or, to state it in even more simple terms, "a creditor may not garnish property **which does not belong to the defendant**."[37]

In this case, the record evidence is undisputed that the contingent payments made by Petitioner pursuant to the receipt of vendor documentation under the Services Agreement were not property to which Tele-Response had a present interest, but were payments necessary, for example, for Tele-Response to pay its utilities and to literally, "keep the lights on," and the

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[34] As Petitioners' CFO testified, "I don't know what tomorrow's expense is going to be, so therefore, I have no obligation today to make tomorrow's expenses that didn't happen yet. . . . So I did not have any outstanding invoices with them that were due on this date. . . . I had no outstanding obligation. So I believe when I signed this, I was signing a true statement saying I do not have any outstanding obligations." [App. at 2245]

[35] See 38 C.J.S. *Garnishment* § 98 (2016) ("Generally, a debt, to be subject to garnishment, must be due absolutely, and without contingency, and a debt which is uncertain and contingent, in the sense that it may never become due and payable, is not subject to garnishment, except when specially authorized by statute.") See also, 38 C.J.S. *Garnishment* § 99 (2016) ("a debt is not garnishable where it does not arise until the occurrence of a condition precedent.")

[36] 38 C.J.S. *Garnishment* § 64 (2016)[Emphasis supplied and footnotes omitted].

[37] *Id.* [Emphasis supplied and footnote omitted].

Circuit Court erred as a matter of law by ruling that these payments were reachable by Respondents' suggestion.

Again, W. Va. Code § 38-5-13, clearly and specifically states, "The answer of the person suggested shall state, in addition to the matters required to be disclosed by the summons mentioned in section ten of this article, the nature and amount of liability or indebtedness to the judgment debtor at the time of service of the summons, or a description of the property of the judgment debtor held by the person suggested **at the time of service of the summons**." [Emphasis supplied]

Accordingly, the Circuit Court clearly erred, as a matter of law, by ruling that contingent payments made by Petitioner pursuant to its Services Agreement with the judgment debtor, Tele-Response, were subject to Respondent's suggestion.

### C. TO THE EXTENT THAT IT RESOLVED DISPUTED ISSUES OF FACT, THE CIRCUIT COURT ERRED BY DENYING PETITIONER'S CONSTITUTIONAL AND STATUTORY RIGHT TO A JURY TRIAL.

In accordance with the general rules of statutory construction, this Court has held that W. Va. Code § 38-5-18 "requires disclosure only as to the 'debts or liabilities due', and that the issue must be determined by 'trial by jury', unless a jury is waived."[38] Moreover, this Court has recognized that "when it is suggested by the plaintiff, that the garnishee has not fully disclosed the debts due by him to, or effects in his hand of, the defendant, the court shall cause a jury to be impaneled to enquire as to such debts and effects."[39]

Respondents correctly argue that, in every civil case, the constitutional right to a trial by jury is tempered by R. Civ. P. 56, but their own Brief is replete with factual disputes that,

[38] *R.S. Corson Co., Inc. v. Hartman*, 144 W. Va. 790, 796, 111 S.E.2d 346, 351 (1959).

[39] *Seamon v. Bank of Berkeley*, 4 W. Va. 339 (W. Va. 1870).

assuming this Court somehow allows Respondents to proceed despite the absence of record evidence that Petitioner had any Tele-Response property or had an present debt obligation to Tele-Response "**at the time of service of the summons,**" must be resolved through a trial by jury.

First, Respondents allege that Petitioner made payments after being enjoined from making further payments,[40] but (1) Petitioner contends that the Circuit Court exceeded its authority in enjoining relative to any property or debt except that which presently existed "at the time of service of the summons" and (2) Petitioner disputes that, as a factual matter, that it made any payments in violation of any order.

Second, even prior to service of the writ of suggestion, Respondents complain that "Petitioner could have paid Respondents regarding of the other liens" [Respondents' Brief at 7], but Petitioner clearly had no obligation to make payments on Respondents' judgment against Tele-Response before even being served with their writ of suggestion.

Third, Respondents argue that, "[W]hile Petitioner may not have known the exact amounts it would have to pay . . . each month, it knew that sums . . . would continue to be . . . due and owing on a monthly basis,"[41] but there is record evidence that the amounts each month fluctuated and "**at the time of service of the summons**" (1) Petitioner had no present obligation to make any payment and (2) Petitioner could not have known the amounts that would be due and owing in following months until it received the requisite invoices.

Finally, Respondents repeatedly advocate their interpretation of the Services Agreement even though they were not parties to the contract and their arguments to the contrary

[40] [Respondents' Brief at 6]

[41] [Respondents' Brief at 7]

notwithstanding, this Court has frequently held that in contract cases where the provisions may be ambiguous, parol evidence is admissible from the parties to those contracts.[42]

## V. CONCLUSION

WHEREFORE, for the reasons stated herein, Petitioner respectfully requests that the judgment of the Circuit Court of Brooke County be reversed and that either judgment as a matter of law be entered in favor of the Petitioner or, in the alternative, that the judgment be reversed and this case remanded for further proceedings pursuant to the directives of this Court.

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[42] Syl. pt. 2, in part, *Berkeley County Pub. Serv. Dist. v. Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968)("Extrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objects relative to the matters involved. . . ."); Syl., *Holiday Plaza, Inc. v. First Fed. Sav. and Loan Ass'n*, 168 W. Va. 356, 285 S.E.2d 131 (1981)("Prior or contemporaneous parol statements may not be admitted to vary written contracts, but may be admitted to explain uncertain, incomplete or ambiguous contract terms."); Syl., *McShane v. Imperial Towers, Inc.*, 165 W. Va. 94, 267 S.E.2d 196 (1980)("While he general rule is that the construction of a writing is for the court; yet where the meaning is uncertain and ambiguous, parol evidence is admissible to show the situation of the parties, the surrounding circumstances when the writing was made, and the practical construction given to the contract by the parties themselves either contemporaneously or subsequently. If the parol evidence be not in conflict, the court must construe the writing; but if it be conflicting on a material point necessary to interpretation of the writing, then the question of its meaning should be left to the jury under proper hypothetical instructions.")[Citation omitted]; see also *Poling v. Pre-Paid Legal Services, Inc.*, 212 W. Va. 589, 575 S.E.2d 199 (2002)(genuine issues of material fact precluded summary judgment in breach of contract case); *Chafin ex rel. Estate of Bradley v. Farmers & Mechanics Mut. Ins. Co. of W.* Va., 232 W. Va. 245, 751 S.E.2d 765 (2013)(genuine issues of material fact precluded summary judgment in breach of contract case); *Thorsbury v. Cabot Oil & Gas Corp.*, 231 W. Va. 676, 749 S.E.2d 569 (2013)(genuine issues of material fact precluded summary judgment in breach of contract case); *Frederick Management Co., L.L.C. v. City Nat. Bank of West Virginia*, 228 W. Va. 550, 561, 723 S.E.2d 277, 288 (2010)("we agree with FMC that there are genuine issues of material fact regarding the use of the phrases 'main banking facility' and 'certain banking facility' in the LTA such that parol evidence concerning their interpretation should be considered and resolved by a jury."); *White v. AAMG Const. Lending Center*, 226 W. Va. 339, 700 S.E.2d 791 (2010)(genuine issues of material fact precluded summary judgment in breach of contract action); *Benson v. AJR, Inc.*, 215 W. Va. 747, 599 S.E.2d 747 (2004)(genuine issue of material fact as to whether employer terminated employee for drug use, rather than dishonesty, precluded summary judgment on breach of contract claim).

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## CERTIFICATE OF SERVICE

I do hereby certify that on February 14, 2017, I caused to be deposited in the United States Mail, postage prepaid, a true copy of the **REPLY BRIEF OF THE PETITIONER,** addressed as follows:

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